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PROGRESS REPORT BY THE SECRETARIAT ON THE IMPLEMENTATION OF THE WORK PROGRAMME OF THE STANDING COMMITTEE

Prepared by the UNCTAD secretariat

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INTRODUCTION

1. This document is an addendum to the document entitled "Progress report by the secretariat on the implementation of the work programme of the Standing Committee" (TD/B/CN.4/25), which reported the progress achieved in the preliminary phase of work on items selected by the Standing Committee. The present document addresses issues that relate to item 3 (g) of the work programme, which calls upon the Standing Committee *to assess the impact of progressive liberalization and of services imports in the development of competitive services sectors; and examine difficulties faced by developing countries which prevent them from increasing their participation in world trade in services*. This background note intends to help initiate the work of the Committee on this topic by identifying elements for the evaluation of the impact of progressive liberalization achieved through the adoption of the General Agreement on Trade in Services (hereinafter referred to as GATS) and the negotiation of specific commitments, which is the most comprehensive approach to multilateral liberalization of services.

2. The GATS establishes for the first time a multilateral framework of rules and principles governing trade in services, with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries. The GATS provides the framework for the achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives. The definition of "trade" in services and the commitments included within the schedules effectively expand the scope of multilateral trade rights and obligations to cover such diverse measures as those relating to investment and to the movement of persons and electronic data across national frontiers.

3. The GATS is one of the pillars of the World Trade Organization (WTO) and is covered by the integrated dispute settlement mechanism. The GATS includes in Part II general obligations and disciplines which apply to all services sectors such as MFN treatment, transparency, increasing participation of developing countries, economic integration, and business practices. Part III of the GATS provides for specific commitments relating to sectors or subsectors in which commitments on market access, national treatment and additional commitments are scheduled. Ninety-four countries have submitted their schedules of commitments, 62 of which have also put forward exemptions to the MFN. The GATS' obligations on safeguards, government procurement and subsidies have to be elaborated after the entry into force of the Agreement Establishing the WTO. Moreover, negotiations will continue after the Marrakesh Ministerial Meeting on financial services, maritime transport services, basic telecommunications services and the movement of natural persons supplying services. As regards professional services a working party will be established after the entry into force of the Agreement Establishing the WTO to examine and make recommendations on the disciplines necessary to ensure that standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade.

4. Developing countries appear to have a strong interest in clear international disciplines to provide them with security of access to markets for their exports, to enable them to attach conditions to their imports that would help them to develop competitive service sectors, and to shield them against bilateral pressure from the major trading powers. The GATS, which clearly

establishes the scope of each member's obligations with respect to trade in services, would seem to achieve this objective. However, it has been the developing countries themselves that have made the major concessions in terms of reduced freedom of action with respect to trade in services, which includes investment. On the other hand, the favourable treatment they are to enjoy has been left to the negotiation of specific commitments and is not autonomously granted. The main question is thus whether the specific commitments will provide meaningful improvements in access to markets for those services of export interest to developing countries. To evaluate fully the balance of rights and obligations and benefits to the developing countries under the Agreement will require more detailed analysis of the schedules of commitments, the conclusion of negotiations on the remaining sectors (i.e. basic telecommunications services, maritime services and financial services) and the mode of supply of movement of natural persons, the implementation of the GATS, in particular Article IV on Increasing Participation of Developing Countries, and the regulatory framework of major trading partners.

5. A determining factor is the extent to which the major trading partners actually respect their obligations in the sense of not abusing the flexibility built into various provisions of GATS, and in renouncing attempts to obtain concessions through bilateral pressures entailing the threat of punitive action rather than through the offer of reciprocal benefits. Their willingness in this respect may be indicated by their attitude to the faithful incorporation of the multilateral obligations in their domestic law and the implementation of Article IV through their specific commitments.

I. THE GENERAL AGREEMENT ON TRADE IN SERVICES

6. The General Agreement on Trade in Services establishes a multilateral framework of rules and principles for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries. The Agreement recognizes the particular needs of the developing countries and partially provides for these needs to facilitate their increasing participation in international trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness.

7. In addition to the specific provisions of the Agreement, there are broader aspects which should be recognized. First, the Agreement provides a mechanism under which developing countries can claim credit for liberalization undertaken in the services sector, i.e. they are entitled to seek improved access in respect of other benefits in return for the commitment to liberalize in any particular service sector. Second, by establishing such commitments in a precise form and providing a detailed contractual framework for trade in services, developing countries become less vulnerable to bilateral pressures to liberalize, in particular in service sectors of interest to the more powerful trading partners. Third, if Article IV on Increasing Participation of Developing Countries is effectively implemented through the negotiation of commitments related to access to technology, distribution channels and information networks, and liberalized markets, it could lead to the strengthening of the developing country's domestic services capacity and its efficiency and competitiveness.

8. The GATS is composed of three pillars: (i) the Agreement containing basic obligations applying to all parties; (ii) the annexes addressing the specificity of individual service sectors and modes of supply and Article II Exemptions which form an integral part of the Agreement in accordance with Article XXIX; and (iii) the schedules of specific commitments which should be annexed to the Agreement and form an integral part thereof in accordance with Article XX of GATS. There are also nine related instruments in the form of Ministerial Decisions and the Understanding on Commitments in Financial Services. Most of the Ministerial Decisions relate to the continuation of negotiations, in particular in the area of basic telecommunications, financial services, maritime services, and movement of natural persons. There are also four institutional decisions, and a Decision on Trade in Services and the Environment.

9. The Agreement contains six parts, 29 articles and eight annexes. The annexes are on Article II Exemptions (i.e. derogations from the MFN clause), Movement of Natural Persons supplying Services under the Agreement, Telecommunications, Negotiations on Basic Telecommunications, two annexes on Financial Services, Air Transport Services, Negotiations on Maritime Transport Services. The other relevant documents are the Ministerial Decisions on Institutional Arrangements and on Certain Dispute Settlement Procedures, the Decision concerning Article XIV (b), Negotiations on Basic Telecommunications, Financial Services, Professional Services, Negotiations on Movement of Natural Persons, Maritime Transport Services, and the Understanding on Commitments in Financial Services. The main provisions of the GATS of crucial interest to developing countries are elaborated on below.

A. Structure

10. The structure of the GATS clearly separates the general obligations and disciplines that would be accepted by all parties upon their signature of the Agreement, of which the most important is the unconditional most-favoured-nation clause (including increasing participation of developing countries, transparency, business practices, etc.) contained in Part II, from specific commitments with respect to market access, national treatment and additional commitments in Part III, which would be the subject of specific negotiations, and included in schedules of commitments. The modalities of achieving progressive liberalization through rounds of negotiations and the kind of measures that should be specified in the schedules of commitments are included in Part IV.

11. The overall structure of the multilateral framework has been an issue of crucial importance in the negotiations and the clear separation achieved in the GATS between general obligations and specific commitments was seen to be essential for the developing countries, as it meant that their adherence to the framework would not, in itself involve granting access in any particular sector, but could offer access commitments in the negotiations of the schedules of commitments, with respect to those sectors or subsectors in which liberalization would be consistent with their development strategies (i.e. the positive list approach).

Box I. Proposals by Developing Countries

The present structure and key provisions derive to a large extent from the proposal by a group of African and Asian developing countries, i.e. Cameroon, China, Egypt, India, Kenya, Nigeria and United Republic of Tanzania (MTN/GNS/W/101) and a group of 11 Latin American countries (Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay (MTN.GNS/W/95). The guiding principles which the developing countries managed to incorporate into the GATS are as follows:

- The multilateral framework should be constitutionally separate from the GATT. GATS is one of the pillars of the World Trade Organization and linked to the GATT 1994 only through the integrated dispute settlement mechanism.

- The paramount goal of the framework was the development of developing countries. The second preambular paragraph provides that "Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries," and the fifth preambular paragraph states: "Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness."

- The framework should have universal coverage. Article I on scope and definition provides that the Agreement applies to measures affecting trade in all services.

- The unconditional MFN clause was needed to fully multilateralize the liberalization achieved under the GATS. Article II of the GATS achieves this goal with the possibility of exemptions in accordance with the Annex on Article II Exemptions and Article V on Economic Integration.

- Participation of developing countries should be based on the principle of relative reciprocity/development compatibility, and not be seen as "special treatment" along the lines of GATT Part IV. Article IV on Increasing Participation of Developing Countries and Article XIX (2) on Negotiation of Specific Commitments provide flexibility for the developing countries in liberalizing trade in services and attaching conditions to market access aimed at achieving objectives referred to in Article IV. Developed countries are supposed to facilitate participation of developing countries in trade in services through negotiated specific commitments relating to strenthening of their domestic services capacity by access to technology, distribution channels and information networks, markets in sectors and modes of supply of export interest to them, and market information.

- Movement of labour as a mode of supply should be included in the framework. Article I:2 (b) and the Annex on Movement of Natural Persons Supplying Services under the Agreement establish that temporary movement of natural persons is one of the four modes of supply of services.

- The adoption of the "positive list" approach comparable to Article II of GATT rather than the"negative list" approach applied by the OECD instruments which provide for across-the-board access commitments, subject to reservations. The "positive list" approach has been adopted as the mechanics of liberalization in the GATS structure (i.e. separating general obligations that would be accepted by all parties upon their signature of the framework in Part II from the market access and national treatment provisions in Part III that would be the

subject of specific negotiations), as well as in provisions of Part III on Specific Commitments and Part IV on Progressive Liberalization, which means that each country can strategically select the individual service sector or transaction that it is willing to open up at a given time, subject to specific conditions and limitations. Market access would result from individual commitments which are negotiated in pursuance of long-term progressive liberalization, and national treatment would be negotiated and not automatically granted pursuant to market access.

- Developing countries should not be requested to make future concessions unless they would be able to derive meaningful benefits from the framework. Article XIX:3 provides for an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the Agreement, including those set out in paragraph 1 of Article IV for the purposes of establishing negotiating guidelines.

- Provisions on anti-competitive activities of transnational corporations in the Afro-Asian proposal have influenced Article IX on Business Practices. Although this Article only provides for consultation and exchange of information it is a general obligation of the GATS.

- Developing countries should be able to regulate their services sectors and standardization of national laws and regulations should not be sought. The fourth preambular paragraph of the GATS recognizes the right of members to regulate, and to introduce new regulations, on the supply of services within their territories. In order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, it recognizes the particular need of developing countries to exercise this right. Article VI on Domestic Regulation requires that members should ensure that all measures of general application in sectors where specific commitments are undertaken are administered in a reasonable, objective and impartial manner.

- Provisions on emergency safeguard measures and restrictions to safeguard the balance of payments was included in the Afro-Asian draft. Article X on Emergency Safeguard Measures provides for future negotiations in this area and Article XIII on Restrictions to Safeguard, Balance of Payments recognises that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation such programmes. Moreover, in determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes.

- The dual role of telecommunications as a sector and as a cross-border mode of delivery should be recognized. The purpose of this separation is to ensure that the conditions of use of telecommunications services as a mode of supply do not impair the market access commitments made in the schedules, to the extent of existing telecommunications capabilities and that liberalization in any sector, including telecommunications should only result from negotiated commitments in the specific sector or transaction included.

B. Scope and definition

12. The definition of trade in services was a key issue in the negotiations on a framework agreement. It was important to agree on such a definition in order to determine the exact scope of the rules and the possible overall balance of advantages that would emerge from the expansion

of trade in services, which related to the implications of definition on coverage.[1] Whereas trade in goods covers only products being sold across a national frontier and what is produced under manufacturing investment is considered as local production, investment in services (income from affiliates abroad) is considered as trade. Developing countries initially applied the traditional understanding of international trade in goods to trade in services, which implied that only cross-border sales of services where the service itself crosses the border, and only the direct sale of services by enterprises or individuals residing in one country to enterprises or individuals residing in another country would be included. Developed countries, on the other hand, supported a definition of trade in services that would provide the possibility of including the production and sale of services by non-residents in the country of the producer or consumer even if no cross-border transaction was involved. The latter approach would include commercial presence or establishment. At the Montreal Mid-term Review, developing countries accepted temporary movement of factors of production (i.e. labour and capital) under the conditions of cross-border movement of services and payment, specificity of purpose, limited duration, and discreteness of transaction, which implied that that there would be no right of establishment.

Box II. Definition of Trade in Services

The definition finally included in the GATS follows the approach which tries to identify the essential attributes of a service transaction in order that it might be considered to constitute trade in services. The definition includes movement of factors of production as well as consumers. The spectrum of international service transactions includes investment and labour. The GATS has universal coverage and applies to measures by members affecting trade in services. The services sectoral classification list of the GATT secretariat (MTN.GNS/W/120), which has been used by the participants for drawing up their schedules of commitments, contains a list of 11 services sectors and 155 detailed subsectors. For the purposes of the Agreement, trade in services is defined as the supply of a service through four modes of supply, namely, cross-border movement, movement of consumers, commercial presence and movement of natural persons suppliers of services. As such it establishes that the movement of persons constitutes trade in services and is an appropriate issue for negotiations of trade concessions. This is clearly an innovation of significant importance for developing countries. Such a wide definition of trade in services would in future lead to complications in determining the origin of the service traded, given the impact of globalization and the nature of trade through establishment, which makes the application of notions of ownership and control more difficult. Article XXVIII of GATS on Definitions provides, *inter alia*, that a juridical person is "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member. It is of interest to note that many of the offers contain under commercial presence less than 50 per cent equity which would mean that the juridical person established would be considered as domestic.

13. There are still some questions on the scope of the GATS that remain to be settled, for example on governmental measures such as those relating to social security. This has relevance for the scheduling of such measures and for the question of MFN exemptions. Pending clarification of this and other questions relating to the scope of the Agreement, the participants have been urged to refrain from taking issues arising in this area to dispute settlement but try to settle them instead through bilateral consultations. However, participants must assume their own responsibilities in deciding whether any measure of this sort which they maintain should

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[1] In terms of empirical analysis, a service can be defined as an act which is the result of a productive activity and whose effect is to change the status or position of a beneficiary. The service output is not distinguishable from its production process and the result or effect of the service is inseparable from its beneficiary and cannot form the subject of a new transaction. Accordingly, classifications of services are classifications of activities, since the nature of various service activities can be described and not classifications of products which are difficult to define and measure. For more details see *Trade and Development Board Report, 1988*, Part Two, "Services in the world economy".

be scheduled or made the subject of MFN exemptions. They are expected to show restraint concerning the inclusion of these measures in their MFN exemptions.

C. Most-favoured-nation treatment

14. The major issue that has been settled in Article II of the GATS is that MFN treatment is unconditional and is to be treated as a general obligation to extend the benefits of any measure on trade in services from any country to all members. Developing countries had been concerned that a "conditional" clause might have been included, which would have meant that they would not benefit from the concessions of the GATS if they did not accept a certain level of liberalization. Article II.2. does, however, provide for certain exceptions from this obligation, governed by the criteria of the Annex on Article II Exemptions. The Annex on MFN exemptions allows the Members to benefit from an exemption for a period of not more than 10 years, with a review requirement after five years (although the possibilities of exemption are rather broad (see below). MFN would also not apply to eonomic integration agreements that fulfil the conditions of Article V and government procurement under Article XIII. The adoption of the unconditional MFN obligation will provide export opportunities in many sectors even if specific commitments on market access and national treatment have not been entered in the schedules, given that many participants already have relatively open markets. The benefits of existing preferential treatment, including under bilateral investment or friendship and commerce treaties, will have to be extended to others if they are not exempted.

15. In some cases, however, such as basic telecommunications, financial services and maritime transport services, some participants, whose markets in these sectors are liberalized, when confronted with closed markets have entered exemptions to MFN treatment as a way to force sectoral reciprocity. These participants were concerned with the loss of negotiating leverage once the unconditional MFN obligation applied to these sectors. Negotiations in the three sectors will continue, at the conclusion of which participants will decide to maintain or enter MFN exemptions. The fact that some of the MFN exemptions entered are couched in terms that would even cover future measures confirms that attempts made to ensure a certain degree of sector-specific reciprocity have been relatively successful.

D. Increasing participation of developing countries

16. By including a clear obligation on "increasing participation of developing countries", the developing countries have obtained a recognition in the GATS of the basic "asymmetry" in the situation of services in developed and developing countries and a commitment that the developed countries would take concrete measures aimed at strengthening the domestic services sectors of developing countries and providing effective market access for their exports, while the developing countries themselves would pursue this objective through the imposition of conditions on foreign suppliers in return for market access. It also permits developing countries undertaking liberalization in service sectors of interest to developed countries to seek reciprocal access concessions in sectors of export interest to them.

17. Article IV becomes operational through the specific terms of Article XIX on Negotiation of Specific Commitments, in Part IV (Progressive Liberalization) of the GATS. Article XIX provides in paragraph 2 that the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual parties, both overall and in individual sectors. There shall be appropriate flexibility for individual developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to it conditions aimed at achieving the objectives referred to in Article IV.

18. The importance of the inclusion of increasing participation of developing countries removes any doubt regarding the legitimacy of measures taken by developing countries to strengthen their services capacity, etc., such as imposing transfer of technology or access to network conditions on foreign services suppliers, or employment requirements, or to apply other national policy measures for this purpose, including the possibility of subsidizing their services sector. In providing access to their markets for foreign service suppliers, some developing countries have attached conditions to access in their schedules of specific commitments such as limitations or requirements with regard to the type of commercial presence, e.g. joint venture requirement or general criteria for authorization to deliver services through commercial presence, which would ensure development of competitive services sectors;[2] minimum requirements for training and employment, e.g. a specific number of staff and directors to be nationals, effective control of the enterprise by the domestic shareholders, training of local employees and employment of domestic subcontractors; local content requirement, e.g. a certain percentage of screen time in private film screening must be devoted to domestic films or advertisement and must have 80 per cent local content; surcharges and different tax rates, e.g. duty-free system with exemption from import duties only applicable to domestic producers; access to technology, e.g. a foreign service supplier should use appropriate and advanced technology, equipment and managerial experience and be under the obligation to transfer its technology and pass on its experience to the domestic personnel - the build-transfer-operate concept; information regarding operations, e.g. a foreign service provider must furnish accurately and promptly reports on operations including technological, accounting, economic and administrative data.

19. Moreover, Article IV on Increasing Participation of Developing Countries provides for the establishment of contact points to facilitate access to information on commercial and technical aspects of the supply of services, registration, recognition and obtaining of professional qualifications, and the availability of service technology. The establishment of such contact

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[2] An example of criteria for grant of commerical presence from the Schedule of Commitment of a developing country is as follows: (i) the effect of commercial presence on economic activity, including the effect on employment, on the use of parts, components and services produced domestically and on exports of services; (ii) the effect of commercial presence on productivity, industrial efficiency, technological development and production innovation; (iii) the effect of commercial presence on competition in the sector concerned and other sectors, on consumer protection, on the smooth functioning, integrity, and stability of the market, and on national interest; (iv) the contribution of commercial presence to integration in the world markets.

points would help developing countries to obtain the relevant information to access markets. The developing countries, however, need to establish the necessary institutional and administrative framework to manage this information and bring it promptly to the attention of their service suppliers.

20. It should be noted, however, that paragraph IV:1 as it stands remains a statement of good intentions as it provides that "The increasing participation of developing countries in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to: (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia*, through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; and (c) the liberalization of market access in sectors and modes of supply of export interest to them."[3]

21. Information technology is both a service in itself and an essential ingredient facilitating the internationalization of many other service activities. Information technology and transborder data flows have been used to establish networks and distribution channels for services that could act as a barrier to market entry of developing countries. Entry barriers can be lowered where the public telecommunication infrastructure is used to market or distribute services, especially where access to, and the cost of, the network is shared by all users. Access to such networks can be a determining factor not only in trade in services but also for providing services essential to trade in goods. The extremely uneven distribution of the systems and infrastructure necessary to increase the productivity of services and transport services to the world markets is a major impediment to increasing exports of services of the developing countries, in particular financial services, audiovisual services, software services, professional services and tourism services. The competitive position of developing country service suppliers would be greatly enhanced by the development of public networks for example public R & D networks along the lines of ESPRIT in Europe at the world level.[4]

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[3] The language of this paragraph has been further weakened since the Brussels text in that the present text uses the word 'negotiated' in the second line of paragraph 1 and the list now is definite and no longer open-ended. Moreover, the reference to access to technology has been removed from 1(b) and in 1(a) has been weakened by the words "on a commercial basis".

[4] See UNCTAD secretariat document TD/B/CN.4/23 prepared under item 3 (a) of the Work Programme of the Committee. Part Two, II of the document highlights access to information networks and distribution channels as a major difficulty to be surmounted by developing countries in order to increase their share of world service trade.

Box III. Access to Information Networks and Distribution Channels

The significance of information networks and distribution channels for the maintenance of a competitive position in international trade in services is dramatically apparent in many service sectors. The world service markets have increasingly become characterized by vertical integration and networking, i.e. the setting up of systematic linkages among activities within the enterprise, between associated firms and with suppliers and customers. Such networking allows various service suppliers to coordinate their activities in order to attain economies of scale and scope, to create value added, and to compete against the networks of competitors. Information technology has made it possible to transport economically vast amounts of information through interacting telecommunication channels. This overcomes the traditional problem of the need for the producer and consumer of a service to be in the same geographical location for services that are essentially "information intensive". For a growing number of services, telecommunications provides a single distribution system, and, when linked with information networks, is a means of establishing closer relations with clients so as to enhance competitiveness and increase value added.

A "network" has been defined as a set of technical means, or infrastructures and strategic norms-enabling actors with rights of access, to set up and manage value-creating relationships among themselves. Every network can be seen as a specific set of interactions among a number of actors who collaborate in extracting value from their relationships, and as networks must provide the physical capacity to interact, they must have access to proprietory or shared infrastructure through which interactions can be channelled. Networks can be classified into the four categories of "intracorporate", "transcorporate", "intercorporate" and "metacorporate" networks. The purpose of intracorporate networks is that of coordinating day-to day activities by enabling
end-users within the same company to share information and processing capacities, while that of transcorporate networks take the form of links between a firm and its closest suppliers and partners. Intercorporate networks implement corporate alliances enabling corporations to share strategic information, technological know-how, cooperate in joint ventures, etc.. The fourth category, metacorporate networks, aims at affecting the environment in which a group of firms operate, particularly with respect to setting and implementing common information technology standards. Thus, the concept of access to information networks involves much more than just "plugging in" and is closely linked to access to and transfer of technology. It would appear that for developing country service suppliers to be able to translate such "access to information networks" into expanded service exports, they must become full participants in the intercorporate and transcorporate networks described above.[5]

Developments in transborder data flows and information technology have led to an increasing demand for international telecommunications services. To offer their services worldwide firms have tried to establish private networks. However, as the cost of installation and maintenance of such networks are relatively high, they have been using soft-ware based networks established over publicly owned networks, which route a call between various locations as if it were on a private network. Examples of these networks are Primex offered by British Telecom to link European facilities and Transpac offered by France Telecom. Private firms are also offering value-added network services such as MCI, the United States long distance carrier, which offers a wide range

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[5] UNCTAD VIII:"Analytical Report by the Secretariat to the Conference" (TD/358), Chapter IV, A. Bressand, "Access to Networks and Services Trade" in Trade in Services - Sectoral Issues,(UNCTAD/ITP/26),1990, and A.Bressand, F. Distler and K. Nicolaidis in "Networks at the Heart of the Service Economy" and G. Spriano, "R and D Networks - The Energy Market for Technological and Scientific Services" in A. Bressand and K. Nicolaides ed., "Strategic Trends in Services, A Services World Forum Project", New York, Harper and Row, 1989.

of network services including (i) Commax, an agreement with Japanese and telecommunications companies to offer voice, data and messaging services between Japan, the United States and the United Kingdom; (ii) Infonet, which provides global services including electronic data interchange (EDI), electronic mail and virtual private networks, owned in conjunction with 10 other telecommunications operators in Europe and the Pacific rim; (iii) Financial Services Association, which is a joint venture with a number of telecommunications companies from France, Belgium, the Netherlands, Italy, Spain and other countries to provide specialized communications services to the global financial services industry; and (iv) Global Communications Services, a one-stop shopping agreement involving 20 other operators.[6]

In the tourism sector, which is traditionally considered as a sector of interest to developing countries primarily owing to the fact that balance-of-payments figures show developing countries running large surpluses in tourism, world-wide tourist revenues are dominated by developed country firms that have been able to establish networks, i.e. hotel chains, travel agencies and computer reservation systems (CRS). The CRS are a striking example of the importance of information networks. Even the major airlines have found it necessary to link up to maximize the profitability of information networks (i.e. computer reservation systems which have themselves become a major source of profit) and the distribution channels, i.e. routes. In air transport, the distribution channels can be expanded only through difficult bilateral negotiations, profitability is derived from the linking and sharing of such existing distribution channels and information networks. Anti-competitive behaviour of CRSs has been the subject of special legislation both in the European Community and in the United States, as well as an ICAO Code of Conduct. In media services, the control of distribution channels permits the producer to control the timing of the presentation of films - a vital component of the value of the production- as well as to ensure a market for its products and its technology.

22. The question of the effective transfer of technology is of the utmost importance in the development of services capacity. Some developing countries have ensured that, if they include in their specific commitments the commercial presence of foreign-controlled entities in particular services subsectors, and the temporary entry of key personnel for such entities, efforts would be made to train local personnel and that they would be given access to state-of-the-art technology through the incorporation in individual country subsector lists of commitments the various conditions regarding measures to ensure an adequate transfer of technology.

23. With respect to the least developed countries, the Preamble, Article IV:3, Article XIX:3, and the Decision on Measures in Favour of Least-Developed Countries provide that particular account shall be taken of their serious difficulties and that they will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. The least developed countries are given an additional period of one year from the date of the Special Ministerial Session concluding the Uruguay Round of Multilateral Trade Negotiations to submit their schedules as required in Article XI of the Agreement Establishing the WTO. It should be noted that implementation of the general disciplines and obligations of the GATS in itself would be a major commitment on their part. Moreover, despite their serious economic difficulties, most of the least developed countries have submitted their schedules of commitments.

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[6] Ken Ducatel and Ian Miles, "Internationalization of information technology services and public policy implications", *World Development*, 20 December 1992, pp. 1843-1857.

E. Economic integration

24. Article V on Economic Integration is similar to Article XXIV of GATT, requiring arrangements to have substantial sectoral coverage and to provide for the absence or elimination of substantially all discrimination between the members.[7] Paragraph 3 of Article V provides for developing countries to have flexibility with respect to the conditions to be fulfilled for such agreements to be acceptable under the provisions of GATS. These conditions are substantial sectoral coverage (in order to meet this condition, agreements must not a priori exclude any mode of supply); absence or elimination of substantially all discrimination in the sense of Article XVII on National Treatment. Paragraph 6 of Article V provides that a service supplier of any other member that is a juridical person constituted under the laws of a party to an agreement on economic integration liberalizing trade in services shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement. Notwithstanding the above provision, in the case of an economic integration agreement involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.[8] Some of the existing integration agreements such as the European Union, the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the North American Free Trade Agreement, the Southern Cone Common Market (Mercosur), the Chile-Mexico Agreement on Economic Cooperation, the Caribbean Community (CARICOM), the Latin American Integration Association (ALADI), the Andean Group (GRAN), the Gulf Cooperation Council (GCC), the African Economic Community (AEC), the Arab Magreb Union (AMU) and the Economic Community of West African States (ECOWAS) include services. Most of the developing countries' integration agreements cover liberalization of services in principle but have not operationalized such goals by adopting the modalities of freeing movements of capital and labour. Progress towards liberalizing or establishing free trade in service under these agreements have proved difficult because of the differentiated and highly regulated nature of services. Emphasis, therefore, remains on the development and strengthening of infrastructural networks among member countries.

25. Developed countries have incorporated services into their cooperation and integration agreements. The most comprehensive approach to free trade in services has been taken by the European Union, which also provides for free movement of goods, capital and labour within it.

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[7] At the Marrakesh Ministerial Meeting, suggestions were made that the existing provisions in GATT are not sufficiently specific and transparent to provide criteria for acceptable forms of regional integration and that the WTO should discuss this issue in greater detail with the aim of specifying the rules for free trade agreements and customs unions that would serve as a supplement to and strengthen the multilateral regime.

[8] The latter provision which grants some flexibilities to developing countries, was not included in the Dunkel text. Paragraph 6 of the Dunkel text, however, included a subparagraph providing that "A Member that is a party to such an agreement may refuse to grant the treatment referred to in sub-paragraph (a) above, if: (i) the service supplier was not established in the territory of a party to such agreement prior to signature of the agreement; and (ii) the parties to such agreement do not provide common treatment to third countries with respect to the sector concerned." The deletion of this subparagraph implies that the juridical person could be established before or after the entry into force of the integration agreement.

The European Economic Area also provides for such free movement. The initial approach of the European Union to regulation was harmonization of such regulation and standards. Since 1987 the emphasis has changed from harmonization to mutual recognition and home versus host country control concerning prudential regulations. OECD countries have also agreed on provisions for the liberalization of services and the mobility of capital and persons among member countries. The experience of developed countries with integration agreements could usefully be applied by the developing countries in liberalizing services at a faster rate among themselves.[9]

F. Monopolies and exclusive service providers/business practices

26. The GATS contains in Article VIII the strict conditions sought by the developed countries on the operations of monopolies. These provisions stipulate, *inter alia*, that:"Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments". On the other hand, the developed countries have resisted comparable provisions with respect to the treatment of restrictive business practices (RBPs) and other anti-competitive practices of private corporations. Although it has been an achievement to include Article IX on Business Practices which, in paragraph 1, states that: "Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.", there is no specific obligation to eliminate these practices. On anti-competitive behaviour of business operators, Article IX only provides for consultations, cooperation and exchange of information. The provision on the behaviour of private operators could be interpreted by enterprises as a clear indication of the lack of determination of governments to deal with anti-competitive practices. For example, in spite of the concern expressed in the United States about dumping of banking services (*inter alia*, during hearings of a Congressional Subcommittee)[10] no explicit reference to the subject is included in the GATS.

27. So-called "club arrangements" such as groupings or associations with responsibility for clearance, payments and settlements or quotation and dealing are potential vehicles for restrictive business practices against outsiders, including foreign banks. The need to ensure that such arrangements do not discriminate against foreign banks is specified in the section on National

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[9] See documents prepared under item 3(j) of the Committee's Work Programme, e.g. TD/B/CN 4/Misc.4. It should be noted that a preferential service area, with a defined market and technological resource base, could facilitate the development of an efficient and competitive regional services supply. Furthermore, it could help service firms from the region or subregion to strengthen their competitive position with respect to third countries.

[10] Uruguay Round Negotiations on Financial Services, Hearing before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance Task Force on International Competitiveness of U.S. Financial Institutions of the Committee on Banking, Finance and Urban Affairs, House of Representatives, One Hundred First Congress, Second Session, 17 July 1990 (Washington, D.C.: U.S. Government Printing Office, 1991), pp.21-22, 32, 34, 36, 38-40 and 68.

Treatment of the Understanding. But it is not clear why obligations regarding the practices of "club arrangements" should be limited to parties choosing to schedule their commitments according to the Understanding. Indeed, there would appear to be a case for including such obligations in the GATS.

28. For a number of sectors, international trade is distorted by anti-competitive practices, and it would be difficult for more vulnerable developing countries to include such sectors in their schedules in the absence of more stringent disciplines. It would seem essential that there should be a clear obligation for the control of anti-competitive practices, as foreseen in submissions by developing countries, which provided that parties should take all possible measures, by legislation or otherwise, to ensure, within their jurisdiction, that service suppliers do not engage in unfair trade practices and that international standards and disciplines for the control of adverse trade effects of anti-competitive behaviour, and a multilateral mechanism to enforce such standards and disciplines should be established. This could be the subject of a work programme and a second round of negotiations along with subsidies, safeguards, government procurement, etc. It could also be the subject of a specific working group. At present, discussions are taking place on the inclusion of competition policy in the agenda of a new round of multilateral trade negotiations.[11]

G. Safeguards

29. Developing countries have stressed that any safeguard clause in the multilateral framework should enable them to take safeguard action not only for balance-of-payments reasons, but also to deal with adverse trade effects caused by situations of concentration of ownership, market domination and restrictive business practices (as the possibility of such a situation arising might have been completely unforeseen when the market access conditions were initially negotiated). Such a clause should also permit the creation of services sectors, the protection of infant industries, and the correction of structural problems.

30. Article X of the GATS on Emergency Safeguard Measures provides for negotiations on a safeguards clause based on the principle of non-discrimination, with the results of such negotiations entering into effect not later than three years from the entry into force of the Agreement Establishing the WTO. In the period before the entry into force of the results of the negotiations, any Member may modify or withdraw its concessions after a period of one year, notwithstanding the three-year period stipulated in paragraph 1 of Article XXI, provided that the Member shows cause that the modification or withdrawal cannot await the lapse of the three-year period. The reasons for the need for such modification or withdrawal are not stipulated in the Article.

31. One of the difficulties faced by participants in the negotiations on obligations in this area is that such obligations would be related to judgements on import penetration and the related economic impact of service imports for which few criteria for measurement exist. The concepts and criteria in the Agreement on Safeguards included in the Final Act could be difficult to apply

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[11] It should also be noted that there are no provisions for "anti-dumping" measures in the GATS.

to services, such as how to measure increased imports and serious injury or threat thereof and to impose quotas and surcharges. There is therefore a need to explore these difficulties and the potential applicability of the provisions of the Safeguards Agreement to services.[12]

32. The manner in which the negotiations took place further complicated the consideration of the safeguards issue, since the initial commitments were negotiated at the same time as the Agreement. Therefore, it seems that there was a tendency to build self-contained safeguards into the initial lists. It would appear, however, that the main concern in drawing up a safeguard clause should be to avoid incorporating those aspects of the GATT Article XIX which have proven unworkable or subject to abuse into the services framework. Some of them might be avoided, if there were a clear understanding from the very beginning as to what situations justified recourse to safeguards measures, and what measures were appropriate, perhaps through an indicative list. It should be noted that the Agreement on Safeguards under the WTO does tackle many of the problems posed by Article XIX of GATT.

33. The advisability of compensation/retaliation provisions would also have to be examined seriously. There is for example, a possibility, as in the Agreement on Safeguards under the WTO, that when the safeguard measures conform to criteria set out in the Agreement there would be no retaliation for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports. Moreover, the Agreement provides that Members applying safeguard measures should endeavour to maintain a substantially equivalent level of concessions. To achieve this objective the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.[13]

H. Payments and Transfers

34. The right of countries to exercise control over international capital movements was a central issue in the negotiations, as it was the subject of considerable pressure by developed countries for relaxation as part of the process of opening up economies to cross-border financial transactions, many of which would be classified as payments for the purpose of transferring capital according to the definition provided by Article XXX(d) of the Articles of the Agreement of the IMF. The GATS in paragraph 2 of Article XI provides that "....a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund." This

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[12] The Peruvian proposal contained in document MTN.GNS/W/74 could be used as a basis for drawing up provisions on temporary derogations.

[13] Temporary waiver provision, similar to the provisions contained in the Agreement on Safeguards, paragraph 23, which is limited to one measure per importing member for a period not exceeding four years, could be drawn up for countries wishing to take safeguard action without resorting to Article XXI provisions and compensation. Negotiation of the safeguard provisions could be based on the experience gained in the operation of this waiver provision. Consideration could also be given to provisions on quantitative restrictions since in many services sectors these restrictions are applied to prevent injury to domestic producers and to control entry into the market.

provision is intended to ensure that restrictions on capital movements do not frustrate concessions with respect to commercial presence; however, they should not impede the developing countries' policy autonomy regarding control of international capital movements.

I. Government procurement

35. Article XIII on Government Procurement states that Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial resale.

36. The question of rules on government procurement are left for future negotiations to be completed two years after the entry into force of the Agreement Establishing the WTO. A lack of rules in this area could create uncertainties with respect to an important issue in trade in services in that government contracts are extremely important in certain sectors (e.g. construction) and the absence of provisions could create some distortions in trade in services.

37. The Agreement on Government Procurement which will be part of the Agreement Establishing the WTO is a revision of the Tokyo Round Code. However, being a plurilateral agreement it will be applicable only to its signatory countries.[14] The Agreement extends the scope of international competition in this area, covering, for the first time, services, including construction services, and procurement at sub-central level. Annexes 4 and 5 of the Agreement define the services and construction services whose procurement by the entities covered is subject to the Agreement's rules. As the cornerstone of the rules is national treatment and non-discrimination, foreign suppliers and foreign goods and services should be given no less favourable treatment in government procurement by the entities covered than national suppliers and goods and services. There is also provision for special and differential treatment of developing countries, the objective of which is to take duly into account the development, financial and trade needs of the developing countries in order to safeguard their balance of payments; promote the establishment or development of domestic industries; support industrial units so long as they are wholly or substantially dependent on government procurement; and encourage their economic development through regional or global arrangements among developing countries. To implement these objectives the developed countries should endeavour to include entities procuring products or services of export interest to developing countries . Moreover, certain mutually acceptable exclusions from the rules of national treatment may be granted to the developing countries. This expanded Agreement will influence the future negotiations on government procurement under the GATS.

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[14] Committee on Government Procurement, Agreement on Government Procurement (GPR/74), 6 January 1994.

J. General exceptions

38. Article XIV on General Exceptions was the subject of considerable discussion at the very end of the Round, owing to the problems that the European Union faced in the audiovisual sector and the United States' concerns on national treatment for taxation. The EU had made proposals on inserting language into Article XIV of the GATS regarding the cultural exception or to include language in certain other provisions of the GATS (Article XIX on Progressive Liberalization, Article XV on Subsidies and the Annex on Article II Exemptions) on the cultural specificity of the audiovisual sector. Finally, owing to the reservations expressed by other participants, the EU has included its agreements on the audiovisual sector in its MFN exemptions and has not included the sector in its offers.

39. In view of the concerns of the Treasury and internal revenue services in the United States about interference in taxation matters as a result of the GATS article on national treatment, the United States proposed to include in its schedule of concessions a horizontal limitation on the national treatment covering all forms of direct taxation. Other participants in the Round believed that such an exception on national treatment could render the United States' offers meaningless. To meet the concerns of the United States Treasury, Article XIV(d) contains a footnote elaborating on the type of measures aimed at the equitable or effective imposition or collection of direct taxes and a definition of direct taxes. The list of these measures is only illustrative.[15] The listing in the footnote of types of measures which governments may find it necessary to take is without prejudice as to whether any of them would necessarily be inconsistent with Article XVII. Moreover, the measures found to be justified under the footnote would normally be expected also to meet the requirement in the chapeau to Article XIV that they should not constitute a disguised restriction on trade. Nothing in the footnote was intended to affect or influence any question concerning taxation at issue between members in the context of bilateral tax treaties. In principle, this exception clause does not necessarily imply acceptance of any tax measure taken by a GATS member,
whether or not covered by that exception clause. Therefore, any tax measure could be taken to dispute settlement.[16]

K. Subsidies

40. While developing countries need flexibility in using subsidies to improve their domestic capacity for production of services, they would have a clear interest in a total prohibition on subsidies by developed countries. Some developing-country proposals provided for a standstill and rollback on subsidies of developed countries and flexibility in the use of subsidies by developing countries to achieve specific objectives. The GATS recognizes in Article XV that, in certain circumstances, subsidies may have distortive effects on trade in services and provides

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[15] For more clarification on this issue see documents MTN.GNS/W/178 and ADD 1, MTN.GNS/W/210 and MTN.GNS/49.

[16] Note the Statement by the Delegation of Switzerland to the GNS at its Meeting on 14 December 1993.

that future negotiations should take place with a view to developing the necessary multilateral disciplines to avoid such trade distortive effects.[17] It would seem that the negotiations would need to address the appropriateness of countervailing procedures. The text also provides that the future negotiations or disciplines shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing countries, for flexibility in this area. The negotiation of precise disciplines was postponed because obligations would relate to judgements on the economic impact of trade. It is clear that for many services it would be difficult to obtain adequate data with respect to market shares and prices, and that the concept of "unit of output", and consequently "unit costs", might be somewhat inapplicable to many services sectors. Other problems would arise from difficulties in identifying the "origin" of services and from confusion between foreign and domestic firms. Difficulties in calculating the price differential arising from a subsidy, and the consequent injury to domestic producers, have led to proposals that subsidies to services trade along with dumping should be dealt with under dispute settlement procedures or through competition law, rather than unilaterally.[18]

41. The broad definition of trade in services under the GATS, which includes trade effected through commercial presence and the movement of natural persons to supply services as well as movement of consumers, could mean that benefits accruing to enterprises (in the sense of Article 1 of the Agreement on Subsidies in the Final Act), such as preferential tax regimes for foreign operations, which directly or indirectly benefit their foreign-based subsidiaries, might also be considered as subsidies to exports of services. Moreover, subsidies to the parent firm in the home country could provide competitive advantages to foreign subsidiaries abroad. Special fiscal and other benefits in favour of foreign consumers who purchase services in the country might also fall in this category. Given the heterogeneity of the services sector, including the differences in the way trade takes place as between sectors, the subsidy question might best be addressed on a sector-specific basis, as it would be extremely difficult to adopt a common approach to identify the trade impact of subsidies.

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[17] It should be noted that GATT Article III provides, in its paragraph 8 (a), that the provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

[18] For more details see "The impact of subsidies on trade in services" (UNCTAD/SDD/SER/3), 4 October 1993, which has been prepared under item 3 (d) of the Work Programme. The Agreement on Subsidies and Countervailing Measures included in the Uruguay Round Final Act provides a definition of a subsidy. The Agreement divides subsidies into three categories, i.e. prohibited subsidies, actionable subsidies and non-actionable subsidies and provides special and differential treatment for developing countries in its Article 27, which includes the phase-out of export subsidies within an eight-year period. It should be noted that this Agreement already addresses some services, for example, the preferential provision of internal transport and freight on export shipments, provided or mandated by governments on terms more favourable than for domestic shipments, constitutes a prohibited export subsidy, and government assistance to consultancy services used for research purposes is considered as a non-actionable subsidy.

Box IV. Entries on Subsidies in the Schedules of Commitments

Some schedules of commitments include in their horizontal sections covering measures applicable to all sectors, under the column limitations to national treatment, an entry on subsidies. Some schedules provide for the possibility of applying all types of subsidies across the board, for example the Schedules of Sweden, Norway, Austria and Mexico, include the entry "unbound for subsidies", which means that all subsidies across the board to national suppliers of services will not be offered to foreign suppliers of services. Other schedules, such as the United States Schedule, include the entry unbound for national treatment under cross-border movement and movement of consumer mode of supply. Under commercial presence and movement of natural persons mode of supply, however, it enters specific types of subsidies i.e. The Federal Overseas Private Investment Corporation (OPIC) insurance and loan guarantees are not available to certain aliens, foreign enterprises, or foreign-controlled enterprises established in the United States; Trade and Development Agency financing is limited to: I. individuals (1) who are either U.S. citizens or non-U.S. citizens lawfully admitted for permanent residence in the United States, and (2) whose principal places of business are in the United States, or II. privately-owned commercial corporations or partnerships that are incorporated or legally organized under the laws of the United States and whose principal places of business are in the United States, and (1) that are more than 50 per cent beneficially owned by individuals who are U.S. citizens or (2) that have been incorporated or legally organized in the United States for more than three years, have performed similar services in each of the prior three years, and employ U.S. citizens in more than half of their permanent full-time positions in the United States and have the existing capability in the United States to perform the contract; measures at the federal, state or local levels that accord rights or preferences to members of socially or economically disadvantaged groups ; and research and development. The EU also provides for subsidies in its schedule, by including a horizontal entry under national treatment limitations relating to commercial presence and movement of natural persons mode of supply. These entries provide that subsidies are unbound for branches established in a Member State by a non-Community company; Eligibility for subsidies from the Community Member States may be limited to juridical persons established within the territory of a Member State or a particular geographical sub-division thereof; unbound for subsidies for research and development; supply of a service, or its subsidization, within the public sector is not in breach of national treatment; and to the extent that subsidies are made available to natural persons, their availability may be limited to a national of a Member State of the Community. Japan, Canada and the Republic of Korea under commercial presence and/or movement of natural persons mode of supply enter under national treatment limitations "unbound for research and development subsidies". The Republic of Korea also provides that eligibility for subsidies including tax benefits may be limited to companies which are established in Korea or to residents according to the pertinent laws.

42. There is not much published information related to subsidies on services although it is clear that some services sectors are highly subsidized, and that members, particularly more vulnerable developing countries, will be reluctant to include such sectors in their Schedules of Concessions until clear rules are drawn up with respect to subsidies. While the reduction and elimination of trade-distorting subsidies could be an eventual objective, it would be important to define, from the beginning, the legitimate objectives of subsidies in services (e.g. to assure a minimum level of services to the population, national security, cultural and environmental protection). The possibility of taking unilateral countervailing measures, given the experience with countervailing duties on goods (which would be potentially open to even greater abuse in the services sector) could cause difficulties in the services sector.

L. Specific Commitments

43. With respect to the specific commitments, as proposed by the developing countries, GATS adopts the positive list approach for the listing of sectors, subsectors and transactions, and the text contains a separation of concepts of market access and national treatment, and provides for separate columns in the schedules of commitments for market access and national treatment commitments. The structure of the GATS provides that market access and national treatment provisions are not general obligations, but are exchanged as negotiated commitments, with respect to individual sectors or subsectors. Market access commitments would be negotiated in accordance with the definition of trade in services, and foreign suppliers could be obliged to accept obligations as described above under Article IV on Increased Participation of Developing Countries as a condition for access to markets. The GATS provides that parties could seek liberalization in those sectors and subsectors where they possess comparative advantage and grant concessions in those sectors where liberalization is judged most compatible with their economic, social and development interests (similar to the situation under the GATT). Such an approach would mean that, as was the case in goods under the GATT, negotiations could address those sectors where liberalization is less difficult and thus quickly consolidate the legal structure of the GATS.

Box V: Restrictions and Limitation on Market Access

When a Member undertakes market access commitments in accordance with Article XVII of the GATS, it should not maintain or adopt the following measures, unless such measures are specified in its schedule of commitments: (i) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test; (ii) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (iii) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (iv) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a service in the form of numerical quotas or the requirement of an economic needs test; (v) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and (vi) limitations on the participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

44. Article XVII on National Treatment, in paragraph 3, stipulates that "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member", which brings in the principle of "equal competitive opportunity". This paragraph could give rise to many disputes as regards its interpretation.

45. A Member might use the concept of "equality of competitive opportunity" to try to broaden the market access granted to its suppliers. This concept could also be used as a means of linking the concepts of market access and national treatment, and is potentially capable of leading to far-reaching intrusions into countries' domestic policies. For example, in the banking

sector, its argument could be that restriction of market access to some submarkets only puts its banks at a disadvantage in competition with domestic institutions. Such a claim would constitute an alternative approach to achieving the objectives of the section of the Understanding on Commitments in Financial Services on Non-discriminatory Measures, which merges the concepts of national treatment and market access, and which commits Members to remove or limit the significant adverse effects of such measures "that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member" or "that limit the expansion of the activities of financial service suppliers into the entire territory of the Member.". In this context, it should be noted that exchange control has long been raised by certain OECD countries as a potential impediment to "equality of competitive opportunity" for foreign banks.[19]

46. Additional commitments further widen the scope of the commitments covered by the GATS by stipulating that members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI and XVII, including those regarding qualifications, standards or licensing matters. The scope of Article XVII on Additional Commitments is not clearly defined, unlike Article XVI on Market Access, and as it stands it is too permissive. Because of the vagueness of this provision most of the schedules of specific commitments do not include the column "Additional commitments" or leave the column blank. The schedules of the Republic of Korea and Japan are among the rare schedules that have entries under the "Additional commitments" column that relate to future liberalization measures. The Japanese entry relates to banking and other financial services commercial presence mode of supply, and states that Japan intends to expand the scope of the Employees' Pension Fund assets, which can be managed by discretionary investment management firms, in respect of the funds qualified by the Minister of Health and Welfare, by removing the distinction between New Money and assets other than new money. The schedule of the Republic of Korea under the subsector "Accounting, auditing and bookkeeping services" provides the following additional commitment: a Korean accounting firm or office may, by paying an annual membership fee, acquire membership in international accounting organizations that have world-wide business networks. The services that may be supplied to a Korean accounting firm or office through a membership contract are consultancy for foreign accounting standards and auditing, training of CPAs, transfer of auditing technology and exchange of information. Under "Temporary movement of natural persons" it allows the movement of persons who are qualified as CPAs under their home country's laws and are employed by international accounting firms for the purpose of supplying the services mentioned above. Entry and stay of these persons is limited to a one-year period which may be extended. The second Korean entry under "Additional commitment" relates to architectural services and covers all modes except commercial presence. This entry provides that supply of services by foreign architects through

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[19] In the first National Treatment Study of the United States Department of the Treasury in 1979, it is stated that "even handed application of foreign exchange controls may affect foreign bank operations which are more heavily involved in foreign lending differently than their domestic counterparts". More recently, in the surveys of selected countries' banking systems in the National Treatment Study of 1990, attention is drawn to instances in which exchange controls prevent banks from fully exploiting their competitive strengths and capacities to innovate with respect to certain financial products (see Department of Treasury, Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Operations (Washington, D.C., 1979), p.1., and National Treatment Study 1990 (Washington, D.C. 1990), pp. 18 and 235-236 relating to foreign securities firms in Japan, and pp. 19 and 259 where the situation of foreign banks in the Republic of Korea is discussed.

joint contracts with architects licensed under Korean law will be allowed as of 1 January 1996. Foreign architects licensed under their home country's law may acquire a Korean architect's license by passing a simplified examination which covers only two of the test's six subjects. The schedules of New Zealand, Australia, Malaysia, Thailand and Singapore provide for additional commitments in the maritime transport services sector by enumerating a list of services that would be made available on reasonable and non-discriminatory terms and conditions to international maritime transport suppliers such as pilotage, etc. The United States provides for an additional commitment in legal services practice as or through a qualified United States lawyer. The additional commitment relates to the possibility of partnership between foreign lawyers and domestic lawyers, and details on the area in which the lawyers could practice.

M. Progressive liberalization

47. In accordance with Article XIX on Negotiation of Specific Commitments, the time-limit for the next round of negotiations on specific commitments is five years after the entry into force of the Agreement Establishing the WTO. A longer time-limit for further negotiation may be more conducive to effectively evaluating the benefits developing countries have gained based on clear statistical data.[20]

48. As mentioned above Article XIX:2 operationalizes Article IV, since it stipulates that "The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to it conditions aimed at achieving the objectives referred to in Article IV". It follows from the above provisions that developing countries should not be asked to adopt liberalization measures that would conflict with their developmental and technological objectives, and that progressive liberalization by developing countries should be governed by the actual expansion of their service exports, not judged on hypothetical market opportunities. The provisions of Article XIX:3 to the effect that the drawing up of guidelines for future negotiations shall be preceded by an assessment of international trade in services with reference to the objectives of the Agreement, including those set out in Article IV:1, is of positive importance in this context.

N. Dispute settlement mechanism

49. The GATS Articles XXII and XXIII on Consultation, and Dispute Settlement and Enforcement respectively should be read in the context of the integrated dispute settlement system contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes. The Understanding provides that retaliatory sanctions are not limited to those

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[20] See document UNCTAD/SDD/SER/1, which provides information on progress achieved at international and national levels on services data statistics and addresses some of the inadequacies of internationally comparable statistics on trade in services.

concessions resulting from the GATS, but that cross-retaliation with concessions on trade in goods and intellectual property would be permitted under certain conditions.[21] Article XXIII, in paragraph 1, provides that "if any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, have recourse to the Understanding ...". It further proposes that recourse may be had to the dispute settlement mechanism when an action by a Member, which is not inconsistent with the Agreement, is alleged to have "nullified or impaired" a right or advantage that another Member could "reasonably have expected" to accrue under a specific commitment of another Member under Part III of the Agreement.

50. The Understanding contains provisions on compensation and suspension of concessions. The complaining party should apply a set of principles and procedures which establish as the general principle that the complaining party should first seek to suspend concessions or other obligations in the same sector as that in which the Panel or Appellate Body has found a violation or other nullification and impairment. Should that not be practicable or effective, it may seek to suspend concessions or obligations in other sectors under the same agreement, and if the party considers that such action is not practicable, then it may seek suspension under another agreement.

51. The "commercial presence" aspect of concessions on services introduces an element peculiar to services and not pertinent to trade in goods. That is, in services it might not always be clear who has a right to invoke the dispute settlement provisions on behalf of whom. For example, if a foreign-owned firm is incorporated domestically and becomes, for the purposes of national law, a domestic firm, would it not have to relinquish the right to have a foreign government intervene on its behalf under the dispute settlement mechanism of the framework? Otherwise would not such a firm be receiving more than "national treatment"? Might it not be necessary to draw up a list of firms "covered by the agreement/concessions" to distinguish them from national firms. The Agreement as it stands does not provide any guidance as to which party is eligible to initiate the dispute settlement mechanism, or to the relationship between local remedies and the dispute settlment mechanism. It is not clear whether the definition of "juridical person" in Article XXVIII on Definitions is intended to provide guidelines in this respect. The lack of provisions on rules of origin may also lead to confusion and disputes.

II. ANNEXES AND MINISTERIAL DECISIONS

52. The annexes are an integral part of the GATS and may be divided into four categories as follows: (i) annex on MFN exemptions enabling a member to add exemptions to Article II prior to the entry into force of the GATS; (ii) annexes covering sectoral specificities, notably air transport and financial services; (iii) annexes defining in more precise terms the modes of supply, namely movement of natural persons and telecommunications; and (iv) annexes

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[21] In the Dunkel text, the dispute settlement system (Articles XXII and XXIII) was based on the corresponding GATT articles, but not as yet interpreted and amplified by the kind of detailed procedural understandings that have filled out the GATT articles. The provisions were self-contained, that is, recourse to a dispute settlement mechanism outside the GATS system was not contemplated.

providing the modalities for continuation of negotiations on financial services, basic telecommunication services and maritime transport services. Some of these annexes are elaborated on by Ministerial Decisions and the Understanding on Commitments in Financial Services.

A. Annex on Article II Exemptions

53. As mentioned above the GATS contains an Annex on Article II Exemptions, which specifies the conditions under which a Member at the entry into force of the Agreement is exempted from its obligations under paragraph 1 of Article II. The universal coverage of the GATS could be circumvented through the unlimited possibility to seek exemptions as provided for in paragraph 2 of Article II on MFN Treatment. The limitation to the open-ended possibility to put forward exemptions is that the Annex relates to existing measures only, although some of the exemptions scheduled are future measures drafted as existing measures. In paragraph 2 it is provided that any new exemptions applied for after the entry into force of the Agreement Establishing the WTO shall be dealt with under paragraph 3 of Article IX (Decision making) of that Agreement. Paragraph 3 relates to the grant of waivers and stipulates that: "In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements; provided that any such decision shall be approved by three-fourths of the Members .... The Conference or the General Council should hold annual review of the waiver.".

54. The developed countries have entered more exemptions to the MFN than the developing countries. This may have been due to the fact that developing countries were not fully aware of sectors and subsectors that require exemption. This means that if the developing countries were unable to identify the exemptions they required before 15 December 1993, they would have to fulfil the strict conditions of Article IX. As the negotiations have not been concluded in three major sectors and one mode of supply, the Ministerial Decisions on Financial Services, Negotiations on Basic Telecommunications and Negotiations on Maritime Transport Services provide that MFN exemptions could be made in relation to these sectors until the conclusion of the negotiations, which is targeted for six months after the entry into force of the WTO in the case of Financial Services and Basic Telecommunications and June 1996 in that of Maritime Services.

55. Of particular interest in the application of the MFN principle is the continuing existence of reciprocity in many countries' regulations governing the granting of market access to foreign banks. Reciprocity conditions enable countries to withhold such access from the banks of another country if their own banks are not granted broadly similar opportunities in that country. Such conditions are in conflict with the MFN principle, but were nonetheless specified as part of the regulatory regimes that several countries have offered to bind in initial offers already submitted. The objective of the continuing negotiations on financial services will be to obtain complete elimination of reciprocity from all members' regulatory regimes for foreign banks. In their initial offers some parties (such as the European Union) have expressed a willingness to abandon reciprocity contingent on the quality of other parties' offers. It would seem that the United States, prior to the adoption of the Final Act by the TNC, attempted to use exemptions from Article II in financial services as a negotiating tactic in order to improve the offers of certain countries. The United States also indicated that it will maintain its derogation from Article II for "basic long distance domestic and international telecommunications services" pending

liberalization in "major telecommunications markets".[22]

56. The Annex on Article II Exemptions is supposed to specify the conditions under which a Member, at the entry into force of the Agreement, is exempted from its obligations under Article II.1, but no such conditions are mentioned in the Annex, except that the Council for Trade in Services shall review all exemptions granted for a period of more than five years. In such a review the Council will examine whether the conditions which created the need for the exemptions still prevail and determine the date of any further review. There is no provision for the initial examination of the exemptions put forward to determine whether they are reasonable, legitimate and do not nullify the benefits under the Agreement.

57. The absence of multilaterally agreed criteria on the legitimacy of seeking exemptions means that countries could abuse the open-ended possibility of entering exemptions and, therefore, that many exemptions could be put forward mainly to gain advantages in the negotiations which would undermine the functioning and credibility of the Agreement. A balance needs to be struck between individual concerns and limitation of the scope and number of such exemptions, and some payment should be required for the maintenance of some types of exemptions, either by withdrawing offers or seeking compensatory concessions from countries making extensive use of Article II:2.

58. With respect to the termination of the exemptions the Annex provides in paragraph 6 that: "In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.". The language indicates that the 10-year period is not definitive and that it could be extended. In actual fact the Annex does not lay down criteria or conditions for the inclusion of exemptions, and most of the exemptions scheduled in the MFN exemption lists are for an indefinite period.

B. Annex on Movement of Natural Persons Supplying Services under the Agreement

59. The inclusion of the Annex on Movement of Natural Persons, deriving from an initiative taken by a group of "like-minded" developing countries,[23] is a clear recognition that concessions with respect to all categories of natural persons could be negotiated. The Annex also clarifies that movement of natural persons mode of supply involves both service suppliers of a party and natural persons of a Member who are employed by a service supplier of a Member. However, as developed countries have not included the categories of interest to developing countries in their specific commitments, and recognizing the importance of achieving higher levels of commitments on the movement of natural persons, and in order to provide for a balance of benefits under the GATS, the Ministerial Decision on Negotiations on Movement of Natural Persons stipulates that negotiations on further liberalization of movement of natural persons for purposes of supplying services shall continue beyond the conclusion of the Uruguay Round, with a view to achieving higher levels of commitments by participants under the GATS. The

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[22] Document MTN/GNS/W/145.

[23] Annex proposed by Argentina, Colombia, Cuba, Egypt, India, Mexico, Pakistan and Peru, which intended to set out, in the form of concrete obligations, principles relative to movement of personnel as a mode of delivery (MTN.GNS/W/106).

Decision provides for the establishment of a negotiating group to carry out the negotiations and produce a final report no later than six months after the entry into force of the Agreement Establishing the WTO.

60. There still remain some assymetries between the treatment of capital and labour. The Annex on Movement of Natural Persons Supplying Services under the Agreement stipulates that Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement, which would relate to entry and temporary stay, and provides in paragraph 4 that: "The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.". Similar limitations are not applied to the movement of capital. Nothing in the Agreement limits foreign direct investment, but offers by developing and some developed countries have indicated that commitments with respect to commercial presence are made within the limitations of existing legislation governing foreign investment in the same way that offers on movement of natural persons are circumscribed by immigration laws.[24]

C. Annex on Telecommunications

61. The Annex on Telecommunications recognizes the dual role of this sector. It relates to telecommunications as a mode of supply and applies to all measures of a Member that affect access to and use of public telecommunications transport networks and services. The purpose of this Annex is to ensure that any service supplier is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for the supply of a service included in its schedule. The Annex, therefore, does not, in itself, result in liberalization in any sector, including telecommunications, without the inclusion of a negotiated commitment in the schedules of concessions. The recognition of the dual role of telecommunications derives to a considerable extent from the insistence of developing countries on this point and the two submissions by India, Egypt, Cameroon and Nigeria. The Annex ensures that the conditions of use of telecommunications services as a mode of supply do not impair the market access commitments made in schedules, limited by existing telecommunications capabilities offered to the public generally. There is no obligation, therefore, to authorize other Members to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its schedule, or to require a Member to establish additional facilities not offered to the public generally.

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[24] For more details on the temporary movement of persons as service suppliers, see the note by the UNCTAD secretariat prepared under item 3 (h) of the Work Programme of the Standing Committee on Developing Services Sectors (TD/B/CN.4/24). The report addresses such aspects as the importance of the temporary movement of persons to trade in services of developing countries, the sectors where temporary movement of persons is important for developing country exports, the general characteristics of immigration laws pertaining to the temporary movement of service suppliers, including the identification of sectors and occupations that tend to benefit from more favourable treatment, and international, regional, subregional and bilateral agreements on movement of persons. It states, *inter alia*, that barriers to the temporary movement of persons that arise from immigration laws and regulations constitute a major impediment to the realization of the competitive potential of developing countries in labour-intensive services.

62. In paragraph 5(g), the Annex provides that a developing Member country may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions should be specified in the Member's schedule. This should provide the possibility of derogating from some of the more onerous provisions. To date only Thailand has scheduled such conditions in its schedule (i.e. build, operate and transfer requirement). The Annex, in paragraph 6, provides for technical cooperation through the development programmes of ITU, UNDP and IBRD and the availability of information with respect to international telecommunications services and information technology. The issue that pricing of telecommunications services should be cost oriented has not been included in the Annex on Telecommunications because of opposition by developing countries. Such a provision would prevent developing countries from cross-subsidizing to finance the extension of more modern telecommunications services on a wider scale throughout their territories. The Annex provides for user rights in paragraph 5(b) which could cause developing countries additional costs and difficulties, and reduce their ability to exercise control over their telecommunications networks. Paragraph 5(c) on cross-border data flow would mean that developing countries would not be able to apply measures to strengthen their knowledge base, e.g. by ensuring use of local databases or the copying of all data sent abroad. Although these obligations only apply to sectors included in the Schedule of Commitments, it is not clear whether they apply when a commitment has not been made with respect to "cross-border" mode of supply. The negative impact of these provisions on the interests of developing countries may be mitigated by the special dispositions of paragraph 5(g).

63. The Annex on Negotiations on Basic Telecommunications relates to the negotiations on market access and national treatment in this subsector. This annex is included to provide for the concerns of the United States, which wished to exclude the subsector from MFN coverage. Their position derived from the perception that, whereas the United States has privatized the basic telecommunications services sector, most other countries reserve this sector for PTT administrations, and thus the extension of any concessions on an MFN basis would deprive the United States of the ability to negotiate market access with such countries. In accordance with the Ministerial Decision on Negotiations on Basic Telecommunications a negotiating group on this subsector has been established. Until the conclusion of the negotiations on basic telecommunications the exemptions to the MFN will not be applicable.

D. Annex on Air Transport Services

64. The Annex on Air Transport Services applies to measures affecting trade in air transport services and ancillary services. It excludes from GATS coverage traffic rights and directly related activities which might affect the negotiation of traffic rights. The Agreement applies, however, to aircraft repair and maintenance services, the marketing of air transport services and computer reservation system services. The operation of the Annex will be reviewed at least every five years.[25] Australia, Malaysia, New Zealand, the Nordic countries and Singapore have proposed that in order for such reviews to be conducted expeditiously and in an adequately prepared manner it will be necessary to gather and compile the relevant information, including

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[25] Document MTN.GNS/W/243, 9 December 1993.

on statistics and modalities in the aviation sector, through the establishment of a Working Party on Air Transport Services. A draft Ministerial Decision was tabled in this regard but was not adopted.

E. Annex on Negotiations on Maritime Transport Services

65. The Annex on Negotiations on Maritime Transport Services provides that the MFN exemptions in this sector shall enter into force only on the date of the implementation of the results of the negotiations mandated by the Ministerial Decision on Negotiations on Maritime Transport Services or, should the negotiations not succeed, on the date of the final report of the Negotiating Group on Maritime Transport Services. Before the implementation of the results of these negotiations, a Member shall be free to improve, modify or withdraw all or part of its commitments in this sector without offering compensation. The Ministerial Decision provides that the Negotiating Group should begin its activities one month after the date of the Decision and conclude its negotiations no later than June 1996, until which date the application of Article II and paragraphs 1 and 2 of the Annex on Article II Exemptions are suspended in their application to this sector and it is not necessary to list MFN exemptions. The participants should not apply any measure affecting trade in maritime transport services except in response to measures applied by other countries and with a view to maintaining or improving the freedom of provision of maritime transport services, nor in such a manner as would improve their negotiating position and leverage.

F. The Annex on Financial Services and the Understanding on Commitments on Financial Services

66. The GATS includes the Annex on Financial Services, which provides for the right of a Member to take measures for prudential reasons, including the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. The Annex includes a section on recognition of prudential measures of any other country and a section on definition of a financial service, including its components - insurance and banking and related services. Recognition of the prudential measures of other countries, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously. Other interested Members will have adequate opportunity to negotiate their accession to such agreements or arrangements or to negotiate comparable ones. The Annex on Financial Services is influenced by the proposal submitted by Malaysia (on behalf of the South East Asia Central Banks and Monetary Authorities (SEACEN group of countries i.e. Indonesia, Malaysia, Thailand, Nepal, Sri Lanka, Republic of Korea, the Philippines, Singapore and Myanmar). The Annex applies to measures affecting the supply of financial services and does not impose liberalization obligations. Its provisions on domestic regulation are based on the overriding importance of prudential considerations, monetary policies, integrity and stability of the financial system. An issue of contention during the Uruguay Round negotiations has been whether or not measures of domestic regulation (including the refusal of market access) taken for prudential reasons should be subject to recourse to dispute

settlement.[26] The GATS and the Annex do not treat the issue directly, but it could be argued that their texts lean towards making prudential measures subject to such recourse. Thus paragraph 2(a) of the Annex (under Domestic Regulation) states that "a Member shall not be prevented from taking measures for prudential reasons" but also that "Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement". In paragraph 4 of the Annex (on Dispute Settlement), provision is made for panels to handle disputes on prudential issues and other financial matters. Such panels "shall have the necessary expertise relevant to the specific financial service under dispute". Since the competence of such panels is not specified, in the Annex as currently drafted they are not subject to any limitations as to the categories of issues that could be submitted to them.

67. The Second Annex on Financial Services provides that, notwithstanding Article II on MFN Treatment and paragraph 2 of the Annex on Article II Exemptions (which contains strict provisions for grant of a waiver of an obligation under Article IX of the WTO), a Member may, during a period of 60 days beginning 4 months after the date of entry into force of the WTO, list in that Annex measures relating to financial services which are inconsistent with paragraph 1 of Article II of the Agreement. The Second Annex also provides that, during a period of 60 days beginning 4 months after the entry into force of the WTO Agreement, any member may improve, modify or withdraw all or part of the commitments on financial services inscribed in its schedule, notwithstanding Article XXI of the GATS on Modification of Schedules, and covering compensatory adjustments.

68. The Understanding on Commitments in Financial Services contains more onerous liberalization obligations than the GATS Part III. It enables participants in the Uruguay Round to undertake commitments with respect to financial services on the basis of an alternative approach. The Understanding is founded on the proposals submitted by the United States and the EEC, and the joint proposal by Canada, Japan, Sweden and Switzerland, but has been influenced by the developing countries' positions. The developing countries were successful in preventing the adoption of a self-contained financial services agreement which would exclude the sector from the overall agreement on services and would involve an instant commitment to implement a programme for the liberalization of financial services for all participants. This is clear from the introductory paragraph of the Understanding, which stipulates that the alternative approach could be applied subject to the following understanding:

- o it does not conflict with the provisions of the Agreement;
- o it does not prejudice the right of any Member to schedule its commitments in accordance with the approach under Part III of the Agreement;

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[26] Thus, for example, in the communication from the delegation of Malaysia to the Working Group on Financial Services including Insurance (MTN.GNS/FIN/W/3) on behalf of the SEACEN group of countries - Indonesia, Malaysia, Thailand, Nepal, Sri Lanka, the Republic of Korea, the Philippines, Singapore and Myanmar - the susceptibility of measures taken for prudential reasons to dispute settlement is rejected. The draft sectoral annex on financial services submitted by Canada, Japan, Sweden and Switzerland (MTN.TNC/W/50), on the other hand, while acknowledging the compatibility with the draft agreement of "reasonable measures taken for prudential reasons", specifies that parties shall nonetheless not be prevented from recourse to dispute settlement regarding such measures.

- o resulting commitments shall apply on an MFN basis;
- o no presumption has been created as to the degree of liberalization to which a Member is commiting itself under the Agreement.

Therefore, the Understanding does not appear to be a source of potential problems for the countries choosing not to make commitments on the basis specified therein but under the GATS itself. Commitments undertaken on the basis of the Understanding would apply to all Members of GATS according to the MFN principle. Thus Members not making commitments under the Understanding would nonetheless benefit from the greater liberalization of financial services by countries that did so. Commitments submitted under the procedure specified in the Understanding are more fully articulated than, and in some cases go beyond, the principles in the articles of the GATS. There is a standstill commitment that any limitation to the commitments in the Understanding should be confined to existing non-conforming measures. Moreover, concerning market access, the Understanding provides for the scheduling of existing monopoly rights and requires the Members to endeavour to eliminate them or reduce their scope. Each Member should also ensure that MFN and national treatment are accorded as regards the purchase or acquisition of financial services by public entities. The Understanding provides market access and national treatment to non-resident suppliers of financial services for transborder trade in some types of non-life insurance, reinsurance and retrocession, services auxiliary to insurance, and provision and transfer of financial information and financial data processing as well as advisory and other auxiliary services relating to financial services. Such access does not include life insurance or intermediation. Commercial presence is granted to other Members, which includes the right to establish or expand within its territory, including through the acquisition of existing enterprises. Commitments on temporary entry of personnel relate to senior managerial personnel, specialists in such areas as computer services, telecommunication services and accounting, as well as actuarial and legal specialists associated with commercial presence. The Members should also endeavour to remove or limit significant adverse effects on financial service providers of certain specified non-discriminatory measures.

69. With respect to banking services, Article XVI of the GATS on Market Access merits especially close attention since it appears to legitimize in principle the kinds of control over market access widely found in practice as part of countries' banking regimes. This control may be exercised with regard to either the sector or subsectors specified in countries' commitments. For example, the Article's reference to limitations on the total number of service suppliers on the basis of an economic needs test presumably permits policies with the objectives of admitting foreign banks to activities where their competition is judged to be beneficial, on the one hand, or of avoiding "overbanking", on the other.[27] The reference to limitations regarding persons

[27] It should be noted that tests regarding economic needs and the avoidance of overbanking are common features of licensing procedures for banks in developed as well as developing countries. For example, community needs are generally among the criteria considered in applications for access by foreign banks to the United States market in the form of branches or subsidiaries. See, for example, W. A. Lovett, *Banking and Financial Institutions Law in a Nutshell* (St. Paul, Minnesota: West Publishing Co., 1988), pp. 214-217, and N. L. Deak and J. C. Celusak, *International Banking* (New York: Prentice-Hall for the New York Institute of Finance, 1984), pp. 25-33. In Japan banking licenses are granted to new banks only if the Ministry of Finances judges that their establishment would not be detrimental to the existing order. *The Banking System in Japan* (Tokyo: Federation of Bankers Associations of Japan (Zenginkyo), 1989), p.40.

employed would make it for policies to be designed to achieve the transfer of skills through on-the-job training for a country's nationals.[28] The references to restrictions on the types of legal entity or joint venture through which services would be supplied and on the scale of foreign investment in domestic enterprises would permit a broad range of policies directed at "indigenization".

70. Such control over market access is to be exercised in a non-discriminatory way. Observance of this obligation in the treatment of foreign banks of different countries seems unlikely to present major problems in principle, although its implementation may prove difficult with regard to the allocation of quotas for banks or other methods of putting ceilings on total permitted market access. However, non-discrimination towards foreign banks in comparison with domestic ones may prove more difficult if, for reasons associated with monetary policy, the authorities prefer to keep certain activities predominantly or entirely in the hands of domestic banks.[29] In cases of this kind it is not easy to envisage an approach compatible with the GATS other than the complete exclusion from the commitments in the country's schedule of an appropriately delimited set of banking activities.

71. The obligations contained in the section on Non-discriminatory Measures of the Understanding commit Members, *inter alia*, to remove or limit the adverse effects of such measures "that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member" or " that limit the expansion of the activities of financial service suppliers into the entire territory of the Member". These provisions merge the concepts of national treatment and market access. The obligations laid down in this section with regard to equality of competitive opportunity seem intended to bring about a process of progressive liberalization of banking markets until there are approximately similar levels in all countries undertaking commitments on the basis of the Understanding.

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[28] The application of nationality restrictions to the personnel of foreign enterprises is common in both developed and developing countries. Moreover, the objective of transferring skills is to be found in the former as well as the latter. See, for example, the account of the regulations under which foreign investment is admitted to the Canadian Province of Quebec in C.D. Wallace, *Legal Control of the Multinational Enterprise* (The Hague, etc.: Martinus Nijhoff Publishers, 1982), p. 70.

[29] Concerning reasons connected with monetary policy why countries may wish to limit or prohibit foreign banks' participation in certain submarkets, see *Trade and Development Report*, 1990 (United Nations publication, Sales No.: E.90.II.D.6), Part Two, chap. II, section F.

72. The provisions of section C on National Treatment in the Understanding are also more stringent than Article XVII of GATS. Each Member is supposed to grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. Moreover, it is provided that national treatment should be accorded for membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, when this is required for provision of financial services on an equal basis by the financial services suppliers of any other Member, or when such entities are provided by the Member directly or indirectly with privileges or advantages in supplying financial services.

73. The Ministerial Decision on Financial Services provides that during a period of six months after the date of entry into force of the WTO Agreement, exemptions listed in the Annex on Article II Exemptions, which are conditional upon the level of commitments undertaken by other participants or upon exemptions by other participants, will not be applied. These provisions were included in the GATS to provide for the concerns of the United States that some countries were not putting forward acceptable offers in the financial services sector and to prevent the United States from requiring reciprocity in the financial services sector which would lead to an undermining of the MFN principle. According to this compromise the United States would schedule its commitments in line with its two-tier approach providing access to financial service suppliers already having presence in the United States market and an MFN exemption for a second tier of countries for which the United States would grant full liberalization on the basis of the Understanding. This MFN exemption would not be effective for the first six months of the entry into force of the WTO Agreement, during which time the United States would evaluate the offers of other countries and decide whether or not it would seek MFN exemption.

G. Ministerial Decision on Professional Services

74. In addition to the above annexes and Ministerial Decisions there are four institutional decisions. The Decision concerning Professional Services contains a recommendation to the Council for Trade in Services to establish a Working Party on Professional Services at its first meeting. The mandate of the Working Party would be to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade. As a matter of priority, the Working Party should make recommendations for the elaboration of multilateral disciplines in the accountancy sector, so as to give operational effect to specific commitments. It should be noted that the professional services sector is one of the sectors in which some developing countries have achieved competitiveness but their trade in such services faces significant difficulties.[30]

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[30] Under item 3 (i) of the work programme the secretariat has prepared a background note (UNCTAD/SDD/SER/2) giving information on harmonization and recognition of qualifications. The note covers laws and regulations in the professional services sector, highlighting those pertaining to qualifications and standards, and outlines the initiatives of governments, regional and subregional agreements and the private sector aimed at achieving such harmonization and recognition. The note also identifies some of the barriers to trade in professional services as follows: non-accreditation, non-recognition of foreign qualifications, denial of access to examinations for completion of qualifications, non-recognition of non-citizens or non-residents, requirement of joint venture or prohibition of joint venture, local establishment requirements, foreign exchange

H. Ministerial Decisions on Institutional Questions and the Environment

75. The Decision on Institutional Arrangements for the GATS empowers the Council for Trade in Services, at its first meeting, to establish subsidiary bodies as appropriate including sectoral committees. The Decision also empowers the Council to establish a Committee on Trade in Financial Services.

76. The Decision on Trade in Services and the Environment acknowledges that measures necessary to protect the environment may conflict with the provisions of the Agreement, and recommends to the Council for Trade in Services that at its first meeting, it should adopt the decision requesting the Committee on Trade and Environment to examine Article XIV of the GATS. Such an examination should be undertaken in order to determine whether any modification to Article XIV is required to take account of the above-mentioned measures, and recommendations made on the relationship between services trade and the environment, including the issue of sustainable development. The Committee should also examine the relevance of intergovernmental agreements on the environment and their relationship to the Agreement.

77. The Decision on Certain Dispute Settlement Procedures for GATS relates to dispute settlement panels. The Decision provides that the panels should be composed of governmental and/or non-governmental individuals with experience in issues relating to the GATS and/or trade in services, including associated regulatory matters. Panels for disputes in specific sectors should have the necessary expertise relevant to the specific sector concerned.

III. THE PROBLEMS OF ASSESSING THE IMPACT OF THE RESULTS OF THE NEGOTIATIONS ON SPECIFIC COMMITMENTS

78. It is difficult to establish criteria and parameters for an evaluation of the "value" of concessions and the estimation of their "trade impact" and of the impact of liberalization in the services sector. The impact of the specific commitments should be evaluated in overall terms and on a sectoral basis with reference to the objectives of the GATS, including those set out in paragraph 1 of Article IV and Article XIX:3. The objectives of the negotiations on trade in services are stipulated in the Punta del Este Declaration and the Preamble to the GATS, and are, in particular, to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.

79. The impact of the specific commitments on market access and national treatment will be a function of the extent to which: (i) services sectors and subsectors have been included in individual schedules; (ii) all modes of supply are bound; (iii) market access and national

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controls affecting the repatriation of earnings by firms, restriction of staff that could be employed, entry restrictions such as visa restrictions, denial of access to transborder data flows or distribution channels, and anticompetitive practices of TNCs.

treatment in the transactions listed are limited or qualified; (iv) economic needs test requirements are included without specifying objective criteria; and (v) the exemptions to the MFN. The impact of the commitments has to be assessed in the context of the existing domestic regulatory framework, taking into account whether the country concerned has introduced legislative changes to implement the commitments it has undertaken. A meaningful assessment would also require appropriate disaggregated statistical data on services trade through all modes of supply and a study of the impact of the barriers to entry. Given that disaggregated statistical data are not available, that negotiations have not been concluded on major sectors and a mode of supply, and that objective criteria to weigh offers are lacking, only a very general and qualitative analysis of specific commitments can be undertaken at this stage.

80. By 15 December 1993, 94 countries had submitted their schedules of specific commitments. Most of the offers are accompanied by an MFN exemption list (i.e. 62). The offers vary widely in sectoral coverage, extent of limitations to market access and national treatment and modes of supply coverage. The degree of development of the services sector is reflected in the coverage of the sectors offered. Whereas some of the least developed countries have offered only one sector, many developing and developed countries have put forward comprehensive offers covering most sectors. It should be noted that many developing countries improved their offers significantly in the course of the negotiations by adding more sectors and removing market access and national treatment limitations. Table I gives an overview of the sectoral coverage of the offers.

81. Most offers of both the developed and developing countries provide a standstill on a wide range of sectors, although the standstill often incorporates important qualifications and limitations, such as nationality and residence requirements, limited equity participation, exclusion of acquisitions, etc. The extent to which the commitments actually provide a rollback of restrictions can only be determined by an analysis of the legislative changes introduced by members to implement their concessions. However, even the consolidation of the status quo through the application of the MFN clause, and the specific market access and national treatment commitments made in specific sectors and subsectors by guaranteeing security of access, will expand trade and investment in services. Given the fact that the developing countries have a weaker services sector their offer includes a more limited number of sectors than the offers of the developed countries examined. It should be noted that the developed countries have excluded some important services sectors, for example audiovisual(e.g. EC), maritime services (e.g. USA), and specific subsectors in financial services and business services (e.g. Japan).

82. The modes of supply most frequently included in the Schedules of Commitments are those of commercial presence and movement of consumers. The mode of supply through cross-border trade has been left unbound in many offers, because of lack of feasibility or because commercial presence is preferred (e.g. EU in some business services subsectors). The mode of supply of movement of natural persons has been offered in nearly all schedules through "horizontal" concessions in the limited category of intracorporate transferees (i.e. managers, specialists, executives) and business visitors, which is linked to commercial presence but is without sectoral specificity.

83. A few countries have offered access for additional categories of natural persons.[31] Canada has offered access to "contract related natural persons" providing services that cover engineers, agrologists, architects, forestry professionals, gematics professionals and land surveyers for a period of three months; and the United States has offered "specialty occupations" up to 65,000 persons annually on a worldwide basis in occupations requiring highly specialized knowledge and full state licensing, and very strict conditions, i.e. the employer has taken steps to recruit and train sufficient United States workers in the specialty occupation, etc., entry for such persons is limited to three years, and legal services practice as or through a qualified United States lawyer. Japan provides access to natural persons engaged in some specific activities of legal services, accounting, auditing, bookkeeping and taxation for a period not exceeding five years. Certain developed countries withdrew some of their horizontal categories at the last stage of the negotiations; for example, Switzerland withdrew the category of "other natural persons supplying services" who are employees of an enterprise that does not have a commercial presence in Switzerland and have a contract with a Swiss consumer of services, and Canada withdrew its offer on computer systems analysts. Many of the offers by developed countries, e.g. EC and the Nordic countries in the business sector, have nationality or residence requirements that render access very difficult.

84. Most developed countries have therefore made horizontal offers regarding the movement of natural persons, accepting commitments with respect to intracorporate transferees - executives, managers, specialists and business representatives - with very little specificity in terms of sectors or occupational categories (although more stringent requirements are imposed in certain sectors). In many cases, these bindings only cover a small proportion of the various visa categories for temporary entry.[32] Movement of persons in categories other than managers, specialists and executives is unbound, despite the fact that the developing countries have repeatedly included this mode of supply in their requests. Such offers could provide some advantages to the firms of a few developing countries, but obviously would be of greater benefit to other developed countries. These offers, in their present form, do not provide any security of access for developing country service suppliers, regardless of their skills, to be recruited for special assignments, and the absence of any sectoral or occupational category indication makes it difficult to evaluate the value of the offers to the developing countries and design a serious export capacity.[33] It should be noted that in the area of access to distribution channels and information networks the offers of some developed countries (e.g. United States, Canada, Switzerland) omit access to computer reservation sytems.

85. The emphasis of most offers put forward by the developed countries is on commercial

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[31] Some developing countries offered access for additional categories, in particular independent professionals, e.g. Malaysia, Argentina and India.

[32] For more details on temporary movement of persons see document TD/B/CN.4/24, which elaborates on domestic legislation on movement of persons and international regimes based on regional arrangements and bilateral agreements.

[33] The GATT evaluation of the results of the Round emphasizes the benefits achieved through the commercial presence mode of supply, that is, investment in services sectors of developing countries, and deemphasizes the movement of persons mode of supply that would provide market access for developing countries to markets of developed countries. See document MTN.TNC/W/122, 29 November 1993.

presence mode of supply and movement of persons in the form of intracorporate transferees. Most developing countries are not in a position to benefit from the commercial presence mode of supply, given the high cost of establishment in developed countries and the weaknesses of developing countries' firms in terms of financial and human capital and access to distribution networks and information channels and technology.

86. With respect to sectors of particular interest to developing countries, most of which require the movement of persons other than specialists, executives and managers, such as tourism-related services, construction and engineering, business services, health-related services and maritime transport, it should be noted that they are included in the offers of the developed countries examined. However, only top management personnel are allowed to move to provide such services. Moreover, the negotiations on maritime and financial services are continuing. It should be noted that in the financial services sector the United States is pursuing the opening of markets in, for example, Japan and ASEAN countries.

Conclusions

87. Negotiations are continuing on the specific commitments, particularly in major sectors namely financial services, maritime services and basic telecommunication services, as well as on the mode of supply of movement of natural persons, which is of particular interest to developing countries. These negotiations will provide developing countries with the final opportunity to pursue their requests in the area of movement of persons in this Round of negotiations. It should be noted, however, that in the negotiations on the three sectors the developing countries are under very heavy pressure to offer even more market access to developed countries. Once the negotiations on the major sectors mentioned above, on the movement of natural persons and on exemptions to the MFN have been concluded, the results of the negotiations on trade in services could be fully evaluated.

88. Although in this Round of negotiations developing countries may not have obtained commitments of major economic value to them for the reasons mentioned above, the Agreement establishes a mechanism for the progressive removal of restrictions and liberalization of sectors under which developing countries could pursue, in future Rounds, further liberalization in sectors and modes of supply of particular interest to them.

89. In order to organize its work under item 3 (g), as well as to establish priority issues, the Committee might wish to consider the following elements for the assessment of the impact of progressive liberalization and the examination of difficulties faced by developing countries which prevent them from increasing their trade in services: (i) the extent to which services sectors and subsectors have been included in individual schedules of specific commitments; (ii) the extent to which the various modes of supply are bound; (iii) the extent to which market access and national treatment in the transactions listed are limited or qualified including through the economic needs test; (iv) the MFN exemptions and their effects on the value of offers; (v) the extent to which countries have introduced legislative modifications to implement the commitments they have undertaken; (vi) sectors and subsectors in which developing countries are competitive or are likely to develop competitiveness and the most significant barriers to trade in these activities; in this context measures to strengthen the database and disaggregated statistics on trade in services should also be considered.

90. Members of the Standing Committee might wish to suggest methodologies and criteria for evaluating the impact of measures for liberalizing trade in services, drawing upon those which they have developed for the evaluation of the impact of GATS on their exports and imports of services.

TABLE I - OVERVIEW OF INITIAL COMMITMENTS IN SERVICES SECTOR (STATUS: 15 DECEMBER 1993)

Countries and Territories	1. Business	2.Commun.	3. Constr.	4. Distrib.	5. Educat.	6. Environ.	7. Finance	8. Health	9. Tourism	10. Recr.	11. Trans.
Australia	x	x	x	x	x	x	x	x	x	x	x
Austria	x	x	x	x	x	x	x	x	x	x	x
Canada	x	x	x	x		x	x		x		x
EC	x	x	x	x	x	x	x	x	x	x	x
Finland	x	x	x	x		x	x		x	x	x
Iceland	x	x	x	x	x	x	x		x	x	x
Japan	x	x	x	x	x	x	x	x	x	x	x
New Zealand	x	x	x	x	x		x		x		x
Norway	x	x	x	x	x	x	x		x		x
South Africa	x	x	x	x			x		x		x
Sweden	x	x	x	x		x	x		x	x	x
Switzerland	x	x	x	x	x	x	x		x	x	x
United States	x	x	x	x	x	x	x	x	x	x	x
Liechtenstein	x	x		x	x	x	x		x	x	x
Czech Republic	x	x	x	x	x	x	x		x		x
Hungary	x	x		x	x		x	x	x	x	x
Poland	x	x	x	x	x	x	x	x	x		x
Romania	x	x	x	x		x	x		x		x
Slovak Republic	x	x	x	x	x	x	x		x		x
Algeria									x		
Antigua and Barbuda	x						x		x	x	x
Antilles	x		x	x			x		x	x	x
Aruba	x		x	x			x		x	x	x

Countries and Territories	1. Business	2.Commun.	3. Constr.	4. Distrib.	5. Educat.	6. Environ.	7. Finance	8. Health	9. Tourism	10. Recr.	11. Trans.
Argentina	x	x	x	x			x		x		
Barbados	x	x					x			x	
Belize								x			
Bolivia								x	x	x	
Brazil	x	x	x	x			x		x		x
Cameroon	x								x		
Chile	x	x					x		x		x
China	x		x		x		x		x		x
Colombia	x	x	x				x		x		
Congo									x	x	
Costa Rica	x				x			x	x		
Côte d'Ivoire	x		x						x		x
Cuba	x	x	x				x		x	x	x
Cyprus	x						x				
Dominica		x					x		x	x	
Dominican Republic	x	x	x				x		x		x
Egypt			x						x		x
El Salvador	x	x				x	x		x		x
Fiji									x		
Gabon	x		x				x		x		
Ghana			x		x		x		x		x
Grenada		x					x		x	x	
Guatemala	x						x		x		
Guyana	x	x					x	x	x		
Honduras	x						x		x		

Countries and Territories	1. Business	2. Commun.	3. Constr.	4. Distrib.	5. Educat.	6. Environ.	7. Finance	8. Health	9. Tourism	10. Recr.	11. Trans.
Hong Kong	x	x	x	x			x		x	x	x
India	x	x	x				x	x	x		
Indonesia	x	x	x				x		x		
Israel	x	x					x		x		
Jamaica	x				x		x	x	x	x	x
Kenya		x					x		x		x
Republic of Korea	x	x	x	x		x	x		x		x
Kuwait	x		x	x			x		x	x	x
Macau	x						x				
Malaysia	x	x	x				x	x	x	x	x
Malta							x		x		x
Mauritius		x							x		
Mexico	x	x	x	x	x		x	x	x		x
Morocco	x	x	x			x	x		x		x
Namibia	x								x		
New Caledonia	x					x			x	x	
Nicaragua	x	x					x		x		x
Nigeria		x					x		x		x
Pakistan	x		x				x	x	x		
Paraguay							x		x		
Peru	x	x		x			x		x	x	x
Philippines	x	x					x		x		x
Saint Lucia							x	x	x	x	x
Senegal	x	x		x					x	x	x
Singapore	x	x	x				x		x		x

Countries and Territories	1. Business	2.Commun.	3. Constr.	4. Distrib.	5. Educat.	6. Environ.	7. Finance	8. Health	9. Tourism	10. Recr.	11. Trans.
Sri Lanka									x		
St. Vincent & the Grenadines							x	x	x	x	x
Suriname									x		x
Swaziland	x							x	x		
Thailand	x	x	x	x	x	x	x		x	x	x
Trinidad and Tobago	x				x		x	x	x	x	x
Tunisia		x					x		x		
Turkey	x	x	x		x	x	x	x	x		x
Uruguay	x	x					x		x	x	x
Venezuela	x	x	x				x		x		x
Zimbabwe		x					x		x		

Bangladesh									x		
Benin							x		x		x
Burkina Faso									x		
Gambia	x	x		x					x	x	x
Madagascar	x										
Myanmar									x		
Niger									x		x
Tanzania, United Republic of											
Uganda									x		
Zambia	x		x					x	x		